In The

Supreme Court of the United States

October Term, 1979

No. 79-185

CONSUMERS UNION OF
UNITED STATES, INC.,
AND
VIRGINIA CITIZENS CONSUMER COUNCIL,
Appellants,

v.

VIRGINIA STATE BAR, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

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The appellees, Virginia State Bar, et al., respectfully move the Court to affirm the judgement of the United States District Court for the Eastern District of Virginia with respect to the denial of an award of attorneys' fees against the Virginia State Bar on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The Jurisdictional Statement correctly describes the procedural aspects of the proceedings in the District Court, except insofar as it fails to inform the Court that the special circumstances doctrine was raised as a defense to the fee award. The appellants' Statement of the Case states the facts in an argumentative fashion which does not assist the Court. Accordingly, appellees offer the following statement of facts pertaining to the circumstances of the denial of fees against the Virginia State Bar (the Bar).

Appellants correctly note that the Bar responded to a question by an attorney that the proposed directory would violate the then existing ban on advertising (Jurisdictional Statement, p. 4). The attorney was not a plaintiff in the action.

The other facts before the District Court pertaining to the Bar were set forth in the "Brief on Behalf of the Defendants," filed on June 5, 1978. The attorney who posed the question of the directory's compliance with the Rule had requested a formal ruling to which the Bar was obligated to respond. "Brief on Behalf of the Defendants" at 2. At the June 1975 meeting when the ruling was made, the Bar appointed the Advertising Committee to study the Rule. *Ibid.* The modified Rule proposed to The Supreme Court of Virginia on April 7, 1976, was substantially similar to the American Bar Association's (ABA) rule on the subject which had been adopted on February 14, 1976. *Id.* at 3. Since the ABA rule did not allow advertising of fees, it would have been invalid under *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). Consumers Union indicated that it would have continued to litigate that issue. While it is true that The Supreme Court of Virginia represented to the District Court in its Petition for Rehearing that it lacked adequate documentation to ascertain whether the ABA rule

was the answer, that failing was not attributable to the Bar, since it was only acting with dispatch in transmitting the ABA rule. Appellants therefore misinterpreted the facts in accusing the Bar of submitting a thoughtless new rule.

Defendants argued that the Bar was immune from fees under the doctrine of judicial immunity and under the special circumstances doctrine. *Id.* at 9. Special circumstances included the Bar's entitlement to assume the validity of the advertising rule under prior decisions of this Court and the prevalence of similar rules in other states. *Id.* at 13. Also attached was a copy of a decision in which a federal district court ruled in another challenge to Virginia's advertising rule that in view of the Bar's good-faith representation to comply with *Bates,* injunctive relief was unnecessary. *Id.* App. 5a.

None of the foregoing facts were denied by Consumers Union. On remand, after *Bates,* the parties negotiated a version of a directory acceptable to all. The defendants notified the District Court of this fact. (Response to Motion for Judgment on the Merits, June 12, 1978). In addition, the Bar had obtained a ruling of the Attorney General that Virginia's advertising rule could not be enforced and had distributed the Opinion to Virginia's attorneys. (Response to Plaintiffs' Motion for Expedited Consideration, December 28, 1978).

Appellants' quotations from the Petition for Rehearing, filed in the District Court by The Supreme Court of Virginia, refer to statements made only for the purpose of showing that the District Court had erred in assuming that because the Virginia Court had not changed the Rule, it had acted in derogation of its responsibilities. The matters in the Petition for Rehearing were not in evidence before the District Court. The Supreme Court of Virginia was offering to show the federal court that it was only awaiting

completion of the processes mandated by its own Rules of Court. The processes have taken longer than usual because revision of the advertising rule requires revision of the ban on solicitation. Even if it is not improper for Consumers Union to cite the Petition for Rehearing of one party as facts in evidence against a different party, the fact is that the Petition for Rehearing, read as a whole, alleges nothing but a reasonable course of responsible conduct by the Bar. The Bar studied the situation, drafted proposed advertising and solicitation rules, debated them, and has now adopted proposed rules and has transmitted them to The Supreme Court of Virginia for action.

REASONS FOR AFFIRMANCE

I.

The Denial Of An Award Of Attorneys' Fees Against The Virginia State Bar Was A Proper Exercise Of Discretion By The District Court.

The Civil Rights Attorney's Fees Awards Act of 1976 amended Title 42 U.S.C. § 1988 to permit a court, in its discretion, to award attorney's fees to a prevailing party in a suit brought to enforce certain civil rights acts, including 42 U.S.C. § 1983. While the award of such fees rests with the sound discretion of the district court, prevailing plaintiffs should ordinarily be awarded attorney's fees, unless special circumstances would render an award unjust. See *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). The rationale for this construction is that the plaintiff is not acting for himself alone, but also as a "private Attorney General" vindicating a policy that Congress considered of the highest priority. *Northcross* v. *Board of Education of Memphis City Schools*, 412 U.S.

427 (1973). Legislative history of the 1976 Act illustrates that Congress' overriding concern was to encourage individuals, particularly members of minorities, to seek relief from invidious discrimination based on race, religion, sex, national origin, and other inherently offensive criteria. *Brown* v. *Culpepper*, 559 F.2d 274, 278 (4th Cir. 1977).

However, the Act specifically provides that the award of attorney's fees is not mandatory. This discretionary authority preserved in the Act indicates a congressional desire that some prevailing litigants, including plaintiffs, in a civil rights action should not be awarded attorney's fees.

Appellants attempt to argue that they are entitled to attorneys' fees if they achieve "substantial public benefits." This argument must fail. The cases relied on by Consumers Union only stand for the proposition that if a case is of fundamental importance, it is proper to apply the law as it exists at the time of decision, rather than at the time the case was filed. Such a rule was enunciated in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801), wherein the Court held that the ship in question was not a proper prize because of a treaty signed after its capture. It was applied in a school desegregation case, *Bradley* v. *School Board of City of Richmond*, 416 U.S. 418 (1974), to award attorney's fees under a statute passed while the case was pending. *Northcross, supra*, was a *per curiam* opinion which held that desegregation cases were cases in which a successful plaintiff should "ordinarily recover" fees, and held it error for the Court of Appeals to have denied fees without stating its reasons. Nothing in any of these authorities provides support for appellants' contention that there cannot be special circumstances justifying a denial of fees in a First Amendment case.

It is well settled that a prevailing plaintiff is not entitled to a fee award as a matter of right pursuant to the so-called

Newman-Northcross rule. In *Zarcone* v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), the court affirmed the denial of the award on the ground that attorney's fees did not present an obstacle to the pursuit of the action.

Defendants submit that the District Court had appropriate facts before it to justify its exercise of discretion in denying an award of attorneys' fees against the Bar. The District Court held that while good faith is not a defense to an award for attorneys' fees, good faith could be a relevant factor in determining whether special circumstances exist. The District Court agreed that the Bar had acted in good faith, both in promulgating and in seeking to obtain a change in the rule. The only action taken by the Bar to enforce the rule held unconstitutional by *Bates* was to perform its duty of responding to a request from an attorney for a ruling whether the attorney's participation in the directory proposed by Consumers Union would conflict with the rule. The District Court found no fault with the Bar's role in the adoption of the rule, and certainly found no fault with the fact that the Bar had participated in the defense of this litigation prior to the *Bates* decision. (Jurisdictional Statement, App. 15a).

In denying the award of fees against the Bar, the District Court applied the rule of *Chastang* v. *Flynn and Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976). This case recognizes that it is not an abuse of discretion to deny attorney's fees where the defendants had reason to believe the challenged policy was lawful when adopted, and the defendant attempted to bring itself into compliance.

The District Court was well aware that the litigation before it had not been initiated or provoked by the Bar. The litigation was filed at a time when recent decisions of this Court had focused attention on the propriety of banning lawyer advertising. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The Bar had appointed its Advertising Committee to advise as to a proper rule.

Although the Bar was properly subject to the jurisdiction of the District Court under 28 U.S.C. § 1343 to test the validity of the rule, there is no other aspect of the litigation which makes equitable an award of attorneys' fees against the Bar.

CONCLUSION

Because appellants have not shown an abuse of discretion, and because appellants are not entitled to an award of attorneys' fees as a matter of right, that portion of the District Court's Order of May 8, 1979, which denied an award of attorneys' fees against the Virginia State Bar, should be affirmed.

Respectfully submitted,

VIRGINIA STATE BAR, *et al.*,
Appellees

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CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of The Supreme Court of the United States and counsel for the Virginia State Bar, *et al.*, hereby certify that three copies of this Motion To Affirm have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 4th day of September, 1979, as follows:

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All parties required to be served have been served.

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